IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 426 OF 2004.

Vithal Waman Kadam and others. ... Appellants.

Versus.

Sunil Baburao Kadam. ... Respondent.

Shri R.A.Thorat for the Appellants.

CORAM : ABHAY S.OKA, J.

DATED : 24th July, 2006.

P.C.:

1. Heard Shri Thorat appearing for the Appellants, who are Defendants in a suit for specific performance of an agreement of sale of an immoveable property. The trial Court dismissed the suit and the counterclaim filed by the Appellants for recovery of possession was decreed. In the appeal preferred by the original Plaintiff, the decree of the trial Court has been set aside and the decree for specific performance has been passed in favour of the Respondent.

2. Shri Thorat appearing for the Appellants submitted that as the suit agreement for sale was executed in contravention of section 48(d) of the Maharashtra Cooperative Societies Act, 1960 the agreement itself was void and therefore, specific performance of the agreement could not have been granted. He submitted that the finding of the trial Court on the issue of readiness and willingness of the original Plaintiff has been upset by the Appellate Court

without dealing with the reasoning of the trial Court. Lastly he submitted that the suit filed by the original Plaintiff was barred by limitation.

3. I have considered the submissions. In my view section 48(d) of the said Act of 1960 will not affect the legality of the suit agreement. In view of section 54 of the Transfer of Property Act, 1882 agreement for sale does not create any interest in favour of the purchaser in respect of the immoveable property. Therefore, agreement for sale cannot be treated as alienation of transfer within the meaning of clause (d) of section 48 of the said Act of 1960. Apart from this fact, the Appellate court has observed that the original Defendants Nos.1 and 2 have agreed to sell only a small portion of the property over which charge has been created in favour of the Land Development Bank and part of the loan has been repaid.

4. So far as the second submission regarding readiness and willingness is concerned, I find that the Appellate Court has discussed the entire evidence. The Appellate Court after considering the pleadings and oral and documentary evidence on record has come to the conclusion that the Plaintiff has established his readiness and willingness to perform his part of the contract. The Appellate Court has observed that if at all any permission for transfer was to be obtained, the

same was the obligation of the Defendants. So far as the bar of limitation is concerned, I find that in the Appellate Court the said issue was not specifically raised. The same was the case with the trial Court. The issue of limitation is a mixed question of law and fact considering the relevant provisions of the Limitation Act, 1963 which deal with the limitation for suit for specific performance.

5. In my view no substantial question of law arises. The Second Appeal is dismissed.

Judge.